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IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

No.

NATHANIEL ROBERTSON,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH JUDICIAL CIRCUIT

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To the Honorable, the Chief Justice and Associate Justices of Supreme Court of the United States:

Nathaniel Robertson, the petitioner herein, prays that a Writ of Certiorari issue to review the judgment of the Sixth Circuit Court of Appeals, entered in the above entitled case on July 23, 1976, rehearing denied on September 3, 1976.

OPINIONS BELOW

The opinion of the Sixth Circuit Court of Appeals is unreported as far as this petitioner is aware, but is printed in Appendix A hereto, infra. . .together with the Order of the Court of Appeals, denying rehearing of said cause.

JURISDICTION

The Judgment of the Court of Appeals for the Sixth Circuit, Appendix, infra, was entered on July 23, 1976. A timely petition for rehearing was denied on September 3, 1976. (Appendix A, p) The jurisdiction of the Supreme Court is invoked under authority of Section 3772, of Title 18 U.S.C., and under the provisions of Rule 22(2) of the Rules of the Supreme Court of the United States, insofar as the within appeal involves a review of questions decided by a United States Court of Appeals, in a federal criminal case.

Additionally, the issuance of the Mandate of the Sixth Circuit has been ordered stayed, pending filing of petitioner's application for certiorari, till September 15, 1976. (See Appendix A, p.)

QUESTIONS PRESENTED

1. WHETHER, WHERE THE SUPREME COURT OF THE STATE OF MICHIGAN HAS DECLARED ALL WARRANTLESS CONSENSUAL TELEPHONIC EAVESDROPPING TO BE VIOLATIVE OF ARTICLE 1, SECTION 11, OF THE MICHIGAN CONSTITUTION OF 1963, A UNITED STATES DISTRICT COURT, SITTING AT DETROIT, IN THE EASTERN DISTRICT OF MICHIGAN, MAY PERMIT THE USE OF RECORDED FRUITS OF SUCH ILLEGAL SURVEILLANCE TO BE USED IN A FEDERAL CRIMINAL TRIAL THERE, TO CONVICT A DEFENDANT, CONSISTENT WITH THE DEMANDS OF A HEALTHY FEDERALISM, AND THE NEED TO AVOID CONFLICT BETWEEN STATE AND FEDERAL COURTS, AND TO PREVENT THE VIOLATION OF STATE LAW BY FEDERAL OFFICERS; AND WHETHER THE GOVERNMENT MAY KNOWINGLY EMPLOY A PAID INFORMER IN PLAIN VIOLATION OF MICHIGAN LAW, TO PROCURE ADMISSIONS WHICH IT PURPOSES TO SUBSEQUENTLY EMPLOY TO CONVICT A PUTATIVE DEFENDANT, WHERE THE SUPREME COURT OF THE UNITED STATES IN ITS ONLY APPROACH TO THE SUBJECT, IN *UNITED STATES* V. *WHITE*, 401 U.S. 745, NEVER DEFINITELY RULED UPON THE ISSUE, BUT DIVIDED ALONG 4-4 LINES, AS TO WHETHER SUCH THIRD PARTY PARTICIPANT MONITORING DID REQUIRE ANTECEDANT JUDICIAL APPROVAL.
2. WHETHER A SEARCH WARRANT ISSUED ON THE BASIS OF DOUBLE HEARSAY,

RELATED TO THE ISSUE OF THE PRESENCE OF NARCOTICS UPON SUSPECT PREMISES, CAN PASS CONSTITUTIONAL MUSTER, AS FURNISHING THE ISSUING MAGISTRATE A "SUBSTANTIAL BASIS" FOR CREDITING THIS TWICE REMOVED HEARSAY, WHERE THE AFFIANT RECITED IN HIS AFFIDAVIT, INFORMATION FURNISHED HIM BY A KNOWN INFORMANT, WHO REPEATED TO THE AFFIANT AGENT, ALLEGED STATEMENTS DERIVING FROM THE APPELLANT'S CO-DEFENDANT, PURPORTING TO LINK THE SOURCE OF A SAMPLE OF DRUGS WITH THE APPELLANT'S PREMISES, WHERE THE CLAIMED STATEMENT OF THE CO-DEFENDANT CAME FROM A PERSON UNKNOWN TO THE AGENT, WAS NOT OVER-HEARD OR RECORDED; WAS NOT CORROBORATED BY ANY FACTUAL CIRCUMSTANCE; AND COULD NOT BE CLASSIFIED AS A DECLARATION AGAINST PENAL INTEREST AS THAT TERM WAS DEFINED IN *UNITED STATES* V. *HARRIS,* 403 U.S. 573.

3. WHETHER A SEARCH WARRANT ISSUED ON THE BASIS OF AN AFFIDAVIT WHICH WAS DEMONSTRABLY TAILORED BY THE OMISSION OF MATERIAL FACT BEARING UPON THE POSSIBLE PRESENCE OF DRUGS ON APPELLANT'S PREMISES, CAN BE SUSTAINED AS VALID WITHIN THE FOURTH AMENDMENT, AND THE CASES DERIVING FROM THE VARIOUS JUDICIAL CIRCUITS, PERMITTING FRONTAL ATTACKS UPON FACIALLY SUFFICIENT AFFIDAVITS, WHERE SUCH FACIAL SUFFICIENCY RESULTS FROM FRAUD, PERJURY, OR CALCULATED OMISSION OF MATERIAL FACT.

4. WHETHER, WHEN OFFICERS EXECUTING A SEARCH WARRANT TURN SAID WARRANT INTO A GENERAL EXPLORATORY SEARCH IN EXCESS OF THE MANDATE OF THE WARRANT, A CONVICTION MADE POSSIBLE THROUGH THE USE OF EVIDENCE UNLAWFULLY SEIZED WITHOUT AUTHORIZATION PROVIDED BY THE WARRANT, SHOULD BE VACATED AND SET ASIDE AS VIOLATING DUE PROCESS OF LAW.

STATUTES & CONSTITUTIONAL PROVISIONS INVOLVED

Amendment 4, United States Constitution:

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath and affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

Amendment 5, United States Constitution:

No person shall. . . .be deprived of life, liberty, or property, without due process of law. . . . .

Article 1, Section 11, of the Michigan Constitution of 1963:

The person, houses, papers and possessions of every person shall be secure from unreasonable searches and seizures. No warrant to search any place or to seize any person or things shall issue without describing them, nor without probable cause, supported by oath or affirmation.

Section 750.539(c), of the Michigan Compiled Laws of 1948, amended:

Any person who is present or who is not present during a private conversation, and who wilfully uses any device to eavesdrop upon the conversation without the consent of all the parties thereto, or who knowingly aids, employs or procures another person to do the same in violation of this section, is guilty of a felony. . .(Eff. March 10, 1967)

Section 750.539(e), of the Michigan Compiled Laws of 1948, amended:

Any person who uses or divulges any information which he knows or reasonably should know was obtained in violation of this section. . .539c. . .is guilty of a felony. . .(Eff. March 10, 1967)

STATEMENT OF THE CASE

The petitioner, NATHANIEL ROBERTSON, while tried in United States District Court, at Detroit, Michigan, for both conspiracy to possess, on December 13, 1973, 465 grams of heroin, and for possession, on December 13, 1973, of those same 465 grams of heroin, in violation of Section 846 and 841(a)(1), of Title 21 U.S.C., was actually cleared of the conspiracy count, and convicted of on Count II of the indictment, which charged *"possession"* of 465 grams of heroin on December 13, 1973. (See Appendix A, p.)

This critically important fact is mentioned, in the first instance to illustrate that the judgment of the court of appeals proceeded on the erroneous assumption that both the petitioner, NATHANIEL ROBERTSON, and his co-defendant, EDDIE HODGE, had been convicted of both counts of the indictment brought against them jointly.

HODGE, whose convictions on both counts were reversed by the Court of Appeal in consequence of the trial judge's failure to submit his entrapment claims to the jury, was awarded a new trial, while ROBERTSON, who, under the testimony adduced was not shown to be in any culpable manner connected with the contraband in question by any evidence other than that of the government informant, MONDAINE, who stated that he stopped by ROBERTSON's house to count the heroin, while on his way to the airport where the bust was effected, was held to have been validly convicted.

Assuming then, that the jury found the petitioner, NATHANIEL ROBERTSON not to have been involved in a general conspiracy with the defendant HODGE, but nonetheless found him guilty of aiding and abetting HODGE in the possession of the 465 grams of heroin transferred by HODGE to the informant, MONDAINE, then it follows that the jury could *only* have arrived at this judgment through a belief in the integrity of MONDAINE's testimony, strongly reinforced by the introduction into evidence, on trial, of the tape recordings of monitored conversations had between MONDAINE and the co-defendant HODGE; and, through attaching significance to a photograph and three checks seized from the petitioner ROBERTSON's house (he claims unlawfully) under the search warrant here contested.

The photo seized from the ROBERTSON premises was an undated, innocuous, polaroid photograph of the petitioner and his co-defendant, EDDIE HODGE. Three seized checks, antedating by more than one year the charge contained in the search warrant, and the indictment, were taken from the ROBERTSON home upon the execution of the warrant by the agents.

Check No. 1, was dated, July 8, 1972, in the amount of $1,000.00, and endorsed by EDDIE HODGE's girl friend. Check No. 2, was dated August 5, 1972, in the amount of $2,200.00, purchased by the petitioner, NATHANIEL ROBERTSON, and endorsed for payment by EDDIE HODGE. Check No. 3, was dated August 18, 1972, for $900.00, endorsed by Eddie's Tape Shack, which was owned by EDDIE HODGE.

Petitioner's challenge to the seizure of these items from his home, under the search warrant issued, was that they were first of all not authorized to be seized under the mandate contained in the warrant; and secondly that their seizure by the agents could not be justified as instrumentalities for the commission of the offense outlined in the search warrant, since the warrant related to matters occurring on December 13, 14, 1973, and the checks in question bore dates more than a year prior thereto, and since there was nothing intrinsically significant about the instruments to justify their seizure as property to which the petitioner was automatically unentitled.

Petitioner's challenge to the seizure of these items was summarily denied in both the trial court, and the Court of Appeals.

Moreover, the petitioner's motion to quash the search warrant and to suppress the evidence seized from his home was denied by the trial and appeals courts, though the petitioner clearly pointed out that the search warrant issued for search of his house contained impermissible hearsay on hearsay, and provided no legally "substantial basis" for crediting the hearsay, or believing that his premises contained heroin, consistent with prior pronouncements of the Supreme Court.

Moreover, during the trial, and on appeal, the petitioner sought to challenge the introduction into his trial of

recordings between the informant MONDAINE and EDDIE HODGE, his co-defendant, where such recordings were unlawfully procured, as he saw it, in violation of Statute Law, and the Search and Seizure provisions of both State and Federal Constitutions. He urged that the reception of the tapes into evidence on his trial, could only serve to deprive him of a constitutionally fair trial.

On appeal, the petitioner pointed out that the Michigan Supreme Court, in *People* v. *Beavers*, 393 Mich. 554, 227 N.W.2d 511 (1975) had declared all warrantless 3rd party consensual monitoring to be violative of the Search and Seizure provisions of the Michigan Constitution, after having considered all of the applicable federal statutes, and federal decisions. And, accordingly, the petitioner there urged again, that since his trial had been permeated with, and affected by, the reception of evidence declared to have been unlawfully obtained by the highest Court of the State of Michigan, his conviction could not stand, and should be set aside.

The Court of Appeals rejected this argument, treating the matter as though it were controlled by a resolution of whose rules of court were to be followed in federal court, rather than as a matter of the transcendant obligation of the federal courts to respect the laws of the several states, and to prevent federal officers from taking advantage of their wilful violation of state laws in acquiring their evidence intended to be used to prosecute those accused of federal crime.

The within appeal is brought to correct those serious errors affecting not only petitioner's conviction, but the conduct of criminal trials generally throughout the United States; and to resolve whether unsubstantiated twice removed hearsay can provide constitutional probable cause for the issuance of federal search

warrants; and whether officers who have information which would detract from their showing supporting a claim of probable cause, may properly omit to mention those facts, and thereby obtain the issuance of a search warrant to which they were rightly unentitled.

Finally, this appeal is brought to settle whether federal-state comity, requires law enforcement officers of the federal government to respect and regard the valid pronouncements of the highest courts of the respective States in which they operate, or whether such officers, and particularly federal officers are so exalted that they can with impunity, utterly disregard state laws altogether in their relentless pursuit of federal crime, intended to be tried in federal courts.

REASONS FOR GRANTING THE WRIT

In the within case we have DEA agents initiating telephone calls to an unsuspecting putative defendant, which are recorded in violation of Michigan law; but which they intend to later use in prosecuting the receiver of the call for federal crime. The question of whether that practice ought to be condoned where indulged in without antecedent judicial authorization, and whether the practice absolutely bars the use of the fruit of such surveillance in a federal trial to support a federal conviction, must be decided here.

The State of Michigan plainly announces that such evidence, so procured, has been unlawfully procured, and *may not be used at all* upon trial. The United States has not clearly spoken to the matter. cf. *United States* v. *White*, 401 U.S. 745, 28 L.Ed.2d 453, 91 S. Ct. 1122, where four justices of the United States Supreme Court held that 3rd party consensual eaves-

dropping did not require antecedent judicial approval, not because it wasn't an invasion of privacy; but that it was not an invasion protected under the Fourth Amendment, as they saw things. Equally persuasive however, Justices Marshall, Douglas, and Harland and Brennan, agreed that current Fourth Amendment jurisprudence did impose a warrant requirement.

Only Mr. Justice Black stated a belief that "eavesdropping" was not a search within the ambit of the Fourth Amendment.

Under these circumstances, the Michigan Supreme Court, in *People* v. *Beavers*, fully mindful of the mish-mash in *U.S.* v. *White*, supra, ruled that participant monitoring, under the Michigan Constitution, without prior judicial approval, violated the Michigan constitution.

In light of what was said in Michigan, in *People* v. *Beavers*, 393 Mich. 554, and particularly its firm announcement, on page 567 that in Michigan, under Article 1, Section 11, of the Michigan Constitution of 1963, 3rd party monitoring of telephone conversations between an informant and another, must be supported by warrant to be properly admitted at trial, the problem presented by the within petition, will remain a recurrent one, until plainly resoived by the Supreme Court.

The *Beavers* Court stated, on page 566 of 393 Mich., "The warrant requirement is not a burdensome formality designed to protect those who would engage in illegal activity, but, rather, a procedure which guarantees a measure of privacy and personal security *to all citizens*."

Further, it should be noted that Section 750.539(c), of the Michigan Compiled Laws of 1948, as amended, provides:

> "Any person who is present or who is not present during a private conversation, and who wilfully uses any device to eavesdrop upon the conversation *without the consent of all the parties thereto,* or who knowingly aids, employs or procures another person to do the same in violation of this section is guilty of a felony. . .(Eff. March 10, 1967)

Section 750.539(e), of the Michigan Compiled Laws of 1948, as amended, further provides:

> "Any person who uses or divulges any information which he knows or reasonably should know was obtained in violation of section. . .539c. . .is guilty of a felony. . .(Eff. March 10, 1967)

Before the Court of Appeals the petitioner urged to that Court that his conviction, because of the use by the federal government of evidence unlawfully obtained, violated the due process clause of the federal constitution.

On p. 36 of the petitioner's brief in the Court of Appeals, he wrote:

> *Due Process,* as defined in Rochin v. California, 342 U.S. 165, 173, 96 L.Ed. 183, 72 S. Ct. 205, on pp. 172, and 173 of 342 U.S.:
>
> "It has long since ceased to be true that due process is heedless of the means by which otherwise relevant and credible evidence is obtained. . .Due process of law, as a historic and generative principle, precludes defining, and thereby confining, these standards of conduct more precisely than to say that convictions cannot be brought about by methods that offend a 'sense of justice.' "

We have come a long way since *Olmstead* v. *United States,* 277 U.S. 438, 468, 48 S. Ct. 564, 569, 72 L.Ed. 944 (1927), when the Supreme Court held that *"the*

admissibility of evidence is not affected by the illegality of the means by which it was obtained."

Mapp v. *Ohio,* 367 U.S. 643, 6 L.Ed.2d 1081, 81 S. Ct. 1684, goes to the heart of our contentions here. As stated there, at p. 657 of 367 U.S. (6 L.Ed.2d 1091):

> The very essence of a healthy federalism depends upon the avoidance of needless conflict between state and federal courts.

And at page 367 U.S., 658, 6 L.Ed.2d 1092:

> Federal State cooperation in the solution of crime under constitutional standards will be promoted, if only by recognition of their now *mutual obligation,* to respect the same fundamental criteria in their approaches. . .Denying shortcuts to only one of two cooperating law enforcement agencies tends naturally to breed legitimate suspicion of "working Arrangements" whose results are equally tainted.

And then finally, on p. 659, of 367 U.S., 6 L.Ed.2d 1092:

> Our government is the potent, the omnipresent teacher. For good or for ill, it teaches the whole people by its example. . .If the government becomes a lawbreaker, it breeds contempt for law, it invites every man to become a law unto himself, it invites anarchy.

Assuming then that *People* v. *Beavers, supra,* is a proper judicial pronouncement, as surely *Ker* v. *California,* 374 U.S. 23, 34, 10 L.Ed.2d 726, 738, 83 S. Ct. 1623 (1963) affirms that it is, then Michigan Statute Law, which prohibits the use generally of wire tap evidence obtained without the consent of both parties, and the use of evidence otherwise unlawfully obtained as Michigan defines the law, must necessarily create the question to be decided here, namely, whether the petitioner, ROBERTSON's, motion to exclude the use

on his trial of tape recordings of HODGE's conversations with MONDAINE, raised a due process issue, requiring a new trial if to be answered in the affirmative.

And this, especially, where the trial judge, upon allowing such evidence to be received, did not limit the possible inferences to be drawn from the conversations to the co-defendant, HODGE, but allowed them to come in without limitation, and to be doubtless used as corroboration of MONDAINE's entire testimony, one part of which went to involve ROBERTSON in measuring the heroin which he claimed HODGE had already delivered to him, and for which HODGE was ultimately arrested at the airport.

True it may be that *Alderman* v. *United States,* 394 U.S. 165, 22 L.Ed.2d 176, 89 S. Ct. 961, limits the right of suppression of such tapes, under the Fourth Amendment, the Omnibus Crime Bill, the Communications Act, and Rule 41 of the Federal Rules of Criminal Procedure, to "persons aggrieved" as outlined in *Jones* v. *United States,* 362 U.S. 377, 19 L.Ed.2d 1247, 88 S. Ct. 967 (1968); but *Alderman* did not turn on *due process* considerations, as a ground for exclusion. And, further, in headnotes 12-14, on p. 175 of 394 U.S. (p. 188 of 22 L.Ed.2d), the *Alderman* court specifically said:

> "Of course Congress, *or State legislatures may* extend the exclusionary rule, and provide that illegally seized evidence is *inadmissible against anyone for any purpose*." (Italics Added)

Petitioner, NATHANIEL ROBERTSON, submits that *this is exactly what the State of Michigan has done* by its legislation, when it says, in Section 750.539(e), of the Michigan Compiled Laws, that: "Any person who. . .divulges any information which he knows, or

reasonably should know was obtained in violation of this section is guilty of a felony."

The issue then is whether, when ROBERTSON's trial was infected by evidence feloniously acquired, under Michigan Law, by federal officers, he was denied due process of law, mandating a new trial.

That issue cannot be decided, as the Court of Appeals attempted to do by saying that federal rules govern the admissibility of evidence in federal trials (citing *United States* v. *Armocida,* 515 F.2d 49,52, cca 3; and *United States* v. *Shaffer,* 520 F.2d 1369, 1372, cca 2) because, as true as that statement may be generally, there are due process limitations to be imposed upon the reception of all evidence in all courts, which limit them, even above the normal rules, in availing themselves of the fruit of felonious action on the part of federal law enforcement officers. As pointed out in *Elkins* v. *United States,* 364 U.S. 206, 4 L.Ed.2d 1669, 80 S. Ct. 1437, on p. 223 of 364 U.S. (p.1680, 1681 of 4 L.Ed.2d):

> "To declare that in the administration of the criminal law the end justifies the means - to declare that the government may commit crimes in order to secure the conviction of a private criminal - would bring terrible retribution. Against this doctrine this Court should resolutely set its face.
>
> . . .A conviction resting on evidence secured through such a flagrant disregard of the procedure which (The Law of Michigan) has commanded cannot be allowed to stand without making the courts themselves accomplices in the willful disobedience of a (law) they are sworn to uphold." (Parenthesis added)

For these reasons certiorari should be allowed to clearly indicate that federal officers cannot introduce evidence in federal trials, obtained in clear violation and

disregard of State criminal law. That is the issue here. *Alderman,* and its rationale as to standing to suppress under federal law, having no relevance here.

Involved is whether the federal government may employ to convict in federal court, evidence which a State has declared was obtained by unlawful means. That question, apparently, needs to be clearly answered for the benefit of a number of Circuits.

2. The search warrant - double hearsay giving rise to probable cause - constitutional insufficiency.

Apart from the foregoing matter, relating to the unlawfulness of the actions of the federal agents in procuring evidence used on the petitioner's trial, certiorari should be granted in the within case to clarify the recurrent question of what showing is constitutionally necessary to satisfy a magistrate that there is a substantial basis for crediting the hearsay of an informant where that hearsay itself contains other hearsay allegedly reported to the informant by one who is ultimately made a defendant in a federal case.

The affidavit, in question, in the within case, reads as follows:

> MELVIN SMITH, S/A DEA, United States Dept. of Justice, Detroit, Michigan, being duly sworn states:
>
> 1) That on various occasions within 3 months, a confidential informant of the DEA has advised that the informant has purchased various quantities of heroin from an individual known to the informant as EDWARD HODGE;
>
> 2) That the confidential informant has advised that EDWARD HODGE deals in substantial quantities of heroin and that the informant has

> personally purchased one half pound quantities of heroin from EDWARD HODGE;
>
> 3) That the confidential informant has a history of proven reliability with the Drug Enforcement Adm. and has been instrumental in providing reliable information in at least three (3) Federal Criminal Cases;
>
> 4) That the aforesaid confidential informant has advised that *quantities of heroin are maintained by EDWARD HODGE or his girl friend prior to the completion of the transaction* for the heroin;
>
> 5) That the aforesaid confidential informant has indicated that it is EDWARD HODGE'S procedure to see the purchaser's money prior to arranging for the delivery of the quantity of heroin to be purchased and that delivery occurs only after EDWARD HODGE goes to his source of supply or "stash pad" to obtain the quantity of heroin to be purchased;
>
> 6) On December 13, 1973, at approximately 10:40 p.m. EDWARD HODGE drove the confidential informant to Stafford's Restaurant, Seven Mile Rd., Detroit, Michigan;
>
> 7) On December 13, 1973, *EDWARD HODGE advised the confidential informant that he, HODGE, was going to pick up a* "sample" quantity of heroin;
>
> 8) On December 13, 1973, at approximately 10:50 p.m., EDWARD HODGE left the aforesaid informant at Stafford's Restaurant, Seven Mile Rd., Detroit, Michigan;
>
> 9) On December 13, 1973, at approximately 10:52 p.m. *Special Agents* of the DEA *followed EDWARD HODGE* from Stafford's Restaurant, Seven Mile Rd., *to 18990 Rosemont,* Detroit, Michigan, and *observed HODGE enter and exit the residence at approximately 11:15 p.m.*

10) On December 13, 1973, at approximately 11:20 p.m., EDWARD HODGE left the 18990 Rosemont address and returned to Stafford's Restaurant, Seven Mile Rd., Detroit, Mich.;

11) *On the same date,* the confidential informant advised that EDWARD HODGE delivered to the informant a quantity of heroin, approximately 1.5 grams, as a "sample" of the quality of heroin to be delivered by HODGE:

12) The *confidential informant further advised* that *EDWARD HODGE indicated* that he had gone directly to his source to obtain the "sample";

13) On December 14, 1973, the *confidential informant advised* that *EDWARD HODGE stated* that he could sell additional quantities of heroin to the informant on short notice;

14) The confidential informant further advised that EDWARD HODGE stated that he, HODGE, had an additional pound of heroin available for delivery on the morning of December 14, 1973;

15) At approximately 6:30 a.m., on December 14, 1973, EDWARD HODGE telephoned the confidential informant and indicated that he, HODGE, had a pound of heroin for immediate delivery and that the quantity to be delivered was the same quality as the sample previously delivered on December 13, 1973, as it was from the same source;

16) On December 14, 1973, at approximately 6:45 a.m., EDWARD HODGE delivered a pound of heroin to the confidential informant while they were in a 1974 Cadillac Fleetwood, Michigan License No. 6747 EN;

17) On December 14, 1973, at approximately 7:45 a.m., special agents of the Drug Enforcement Administration arrested EDWARD HODGE at Metropolitan Airport and seized from the aforesaid

Cadillac Fleetwood approximately 486.2 grams of the substance purported to be heroin;

18) On December 14, 1973, an agent of the DEA performed a field test on the aforesaid substance and received a positive reaction for heroin.

MELVIN SMITH - A/A - DEA

Sworn to before me, and subscribed in my presence, Dec. 14, 1973 - PAUL J. KOMIVES, U.S. Magistrate.

In deciding the case on appeal, as to the sufficiency of the affidavit hereinabove set forth the Court of Appeals held the said affidavit to be sufficient, based on the following reasoning:

> We agree with the District Court's determination that there was probable cause to believe that drugs were stored on the Rosemont premises. The magistrate, upon a commonsense reading of the affidavit could reasonably determine that: 1) a confidential informant (Mondaine) of proven reliability had advised the DEA that Hodge dealt in substantial quantities of heroin; 2) it was Hodge's procedure to inspect the purchaser's money and then go to his source to obtain the drugs; 3) *at a restaurant, Hodge informed Mondaine that he was going to get a sample of heroin;* 4) a DEA Agent followed Hodge to the address on the warrant and then back to the restaurant; 5) Hodge gave the sample to Mondaine indicating that he had gone directly to his source to obtain it and that it was of the quality of heroin Hodge would deliver; and 6) Hodge told Mondaine that he had one pound of heroin available for immediate delivery and could sell him additional quantities on short notice.

Additionally, the Court of Appeals went on to say, in total disregard of the petitioner's argument:

> Robertson notes that the affidavit contains no averment that the heroin was seen at or obtained from the Rosemont residence. He argues that Hodge made many stops on the night he purportedly transferred the sample to Mondaine, yet the affidavit fails to state that Hodge could have obtained the drugs elsewhere. *In view, however, of Hodge's statements upon leaving the restaurant and upon his return* and of the DEA surveillance reports tracking Hodge between Stafford's Restaurant and the Rosemont residence, *there was probable cause* to believe that a quantity of heroin would be found at the Rosemont residence.

The foregoing recitation highlights the error of both courts below. No. 1, there is no averment in the affidavit to the effect that Hodge, *on leaving the restaurant,* said anything. That has to be surmised. The affidavit doesn't so state. Secondly, there is no statement in the affidavit regarding the time *when* Hodge told the informant that he had gone to his source to obtain the sample, which incidentally, no one ever saw, and which only exists in the averment of Mondaine. Secondly, and *this is most important* for Courts to understand, the Court of Appeals attempts to give force, and vital force, to the alleged *hearsay of Hodge,* reported by Mondaine to DEA Agent Smith, who reports both the direct and the indirect hearsay to the Magistrate as gospel fact.

The Agent does not say that Hodge told him thus and so. He says *that Mondaine says that Hodge told Mondaine such and so.* And those recitations are things completely different in contemplation of the law.

I have not been able to find any case yet, which permits probable cause to rest, as here, upon double hearsay, and especially where the source of the second

reported hearsay is not shown to be reliable, or to meet any of the other criteria required for concluding the hearsay ought to be credited.

In fact, in *Madden* v. *State*, 328 N.E.2d 727, the Indiana Supreme Court said that probable cause could not be, I repeat, *could not* be premised on *hearsay on hearsay.* And the *Madden* Court discussed all that was said in *United States* v. *Harris*, 403 U.S. 573, 29 L.Ed.2d 723, 91 S. Ct. 2075 by the United States Supreme Court.

Yet, apparently, it is ever and again necessary to repeat and repeat certain language before it sinks in. In *United States* v. *Harris, supra*, which was supposed to settle the recurring question of the quantum of evidence necessary to support a belief that an unidentified informant's information was truthful, the Court went back to the case of *Jones* v. *United States*, 362 U.S. 257, 4 L.Ed.2d 697, 80 S. Ct. 725, 78 A.L.R.2d 233 (1960), as a "*suitable benchmark.*" (p. 580 of 403 U.S., and p. 732 of 29 L.Ed.2d)

One look at the "benchmark" shows the problem in the within case. In *Jones*, the Court held it reasonable to conclude that narcotics were likely to be located in the place described "because the source of the informationed in the opening paragraph has given information to the undersigned on previous occasion and which was correct, and because the *same information is given by other sources.*"

Mr. Justice Frankfurter, writing in *Jones*, upheld the warrant, even though the information in the affidavit was almost entirely hearsay, on the ground that there was a "substantial basis" for crediting the hearsay. The informant had previously given accurate information, and his story was corroborated by "other sources;" and

additionally the defendant was known to the police as a user of narcotics.

As the Court there pointed out. "Corroboration through other sources of information reduced the chances of a reckless or prevaricating tale; that petitioner was a known user of narcotics made the charge against him much less subject to skepticism that would be such a charge against one without such a history." (p. 271 of 362 U.S., p. 708 of 4 L.Ed.2d)

Reduced to its simplest form, in the within case probable cause is admittedly made out by interpreting the affidavit to state that *as Hodge left* the Stafford Restaurant,he was then going to his stash pad to get a sample of heroin; and that *Hodge returned with a* sample and *said*, critically, that he had gone to his to obtain the heroin sample and that it was of the quality which would be delivered by Hodge to Mondaine.

What do we refer to in the affidavit as a ground for our "substantial belief" that the second informant, Hodge, was reliable? Can we assume his reliability because DEA agents, other than the affiant, saw him drive to a restaurant at 10:40 p.m. of December 13, 1975, leave the restaurant and drive to the Rosemont address, and then return to the restaurant? Or can we assume that Hodge was reliable because at 7:45 a.m. Hodge was arrested at the Detroit Metropolitan Airport with 486.2 grams of heroin in his Cadillac?

Looking through the entire affidavit, the foregoing would be just about what we would have to resort to in order to establish Hodge's reliability. There is nothing in the affidavit which gives anyone a reason to credit Hodge's hearsay. Common experience tells simply that Hodge was a dealer in drugs. Drug dealers, according to common experience, do not talk about where their

sources are located. This fact would detract from the weight anyone would give to anything that Hodge might say; and, as Mr. Justice Frankfurter said in *Jones*, here, there is a strong likelihood of a reckless and/or prevaricating tale.

Further, no fact is set forth in the affidavit to make us credit the so called averments of Hodge. No agent described overhearing any conversation between Hodge and Mondaine, confirming what might have been said between them in the Restaurant, either before or after Hodge's departure for the Rosemont address. No person, agent or otherwise ever saw a sample of heroin, or reported to there ever having been any such sample delivered. Surely, this would have been a tremendously strong corroborating circumstance, had such been added to the affidavit. No person, agent, or otherwise, ever reported seeing a tin foil container in which the sample was supposed to have been delivered by Hodge to Mondaine. And, again, common sense would make us know that an informant with experience with the DEA would save every sample of heroin he was able to procure, and would turn it over to his superiors, and not dispose of it, or "use it up," as Mondaine claimed.

Considering the affidavit in the within case against that in *Rugendorf* v. *United States*, 376 U.S. 528, 11 L.Ed.2d 887, 84 S. Ct. 825, will illustrate the problem in the within case, again.

In *Rugendorf*, a search warrant was issued by a United States Commissioner on the strength of an FBI Affiant, who recited that he had one confidential informant who told him that he, the informant, had seen 82 mink, otter, and beaver stoles and jackets in the basement of Samuel Rugendorf's home in Chicago. His affidavit stated further that he had *another* informant whom the FBI considered reliable, who told

him that certain robbers were the responsible culprits for the theft. He further stated in his affidavit that he had *still another* informant who told him that Rugendorf was the fence for these named culprits. He further recited that he had a *fourth informant* who stated that the named culprits were burglars who disposed of the proceeds of their burglaries to Rugendorf. Additionally the affidavit of the agent averred that there had only been one such burglary in the United States within the past six months preceding his application.

Of this affidavit, the Court said there is "substantial basis" for the Commissioner concluding that stolen furs were probably in the Rugendorf home.

In headnote #4, of the decision, the Court pointed out, on p. 892 of 11 L.Ed.2d, (p. 533 of 376 U.S.), that the Magistrate need not have the informant before him, *so long as there is, in the affidavit itself, a substantial basis for crediting the hearsay.*

Of the premises on Rosemont, the affidavit tells us nothing. Of who was present on the premises, the affidavit tells us nothing. Surely, it would be a novel principle to announce that a house acquired the reputation of being a drug stash by a drug dealer going there for five minutes. Of Robertson, the affidavit tells us nothing.

One final thing, in the affidavit in *United States* v. *Harris*, the *informant* admitted an involvement with the defendant in a manner which offended the criminal laws of the United States.

Because of this circumstance, the Court said, "Common sense in the important daily affairs of life would induce a prudent and disinterested observer to credit these statements."

Thus, *Harris* stands for the principle that reliability of the information may spring from the circumstance that the information as a whole constitutes a declaration against the penal interest of the informant, and thereby acquires reliability. But surely that rule can only apply where the hearsay derives from a person who in fact is admitting his wrongdoing *to a person in authority* who can do something to him about it.

The declaration against penal interest referred to in *Harris* is a *declaration of the informant* against his own penal interest. Where an informant, such as Mondaine, is working as a cog in the law enforcement chain, he has no penal interest. His involvement in any transaction is non-criminal, and sanctioned by the law. He is on a par with police officers who might be acting under cover. In the case of a wily informant whose cooperation has been acquired in the hope of gaining favorable treatment from the government, anything such a person might say would be suspect.

Thus, unless the Supreme Court is prepared to say that hearsay on top of hearsay is sufficient to create probable cause, without anything whatever appearing to establish the reliability of the *source* of the hearsay, it is clear that in the within case, the affidavit supporting the search warrant issued for the Robertson premises was facially insufficient, and certiorari should be granted to treat with the problem of hearsay on hearsay, and the conditions under which its use can create probable cause.

3. The search warrant – tailoring the affidavit by deliberate omission of material fact which would negate probable cause.

Petitioner does not believe that the letter or spirit of the fourth amendment can be satisfied, or that of Rule 41 of the Federal Rules of Criminal Procedure, when an affiant deliberately omits reciting facts within his knowledge which he knows would detract from his showing of probable cause.

If falsehood voids an affidavit, and suppression is required by reason thereof; then equally, deliberate omission of material fact, bearing upon the issue of probable cause should be so treated. And if, as the sixth circuit has held in *United States* v. *Luna*, 6th Cir., 525 F.2d 4, even the reckless use of a designedly false statement, without reason to believe its whole truth, is grounds for suppression, then certainly the same rule must be held to apply where the court is imposed upon by an affiant who omits to mention facts of which he is fully aware in order that he can make a stronger case for the issuance of a warrant.

Cf. also: *United States* v. *Belculfine*, 508 F.2d 58, cca 1, 1974 where *misstatements* knowingly made by an affiant were ordered to be inquired into by the district judge on remand of the cause, with instructions to suppress if such were found to be the case.

Cf. also: *U.S.* v. *Marhart*, 492 F.2d 897, cert. den., 419 U.S. 827, 8th cir.; *U.S.* v. *Thomas*, 489 F.2d 664, 5th cir.; and *U.S.* v. *Carmichael*, 489 F.2d 983, 7th cir.

Petitioner points out that had the affiant reported to the magistrate all of the facts relative to Hodge, and his possible procurement of a "sample" of heroin from sources other than the Robertson address, the magistrate could not have issued a warrant for the Rosemont address.

As the affidavit is presently tailored, the agent intended it to be read in sloppy fashion to imply that delivery of the sample followed Hodge's visit to the Rosemont premises, and that the said premises was his "source."

But, the transcript of testimony taken, and included in the appendix to the appeal, show that this conclusion could not be borne out, had all the facts been laid out in the affiant's affidavit.

For example, at 8:00 P.M. HODGE was at 14312 Longacre, and was later observed to "drive around the City of Detroit and the downtown area, until approximately 10:00 P.M." (p. 42 App.) At about 10:00 P.M. he stopped by a McDonalds Restaurant, even though the testimony established that he had just concluded a full course dinner immediately prior thereto (p. 111 App.); there he picked up an unidentified "young girl" (p. 112 App.) The testimony indicated further that HODGE went "several places," including a Tape Shop prior to going to the Rosemont address. (p. 112 App.) Further, between 7:00 P.M. and 9:30 P.M., HODGE was out of the presence of the informant, during which time no one knew where he went, or what he was doing. (pp. 110, 111 App.)

The important thing is however, that "between a quarter of Ten and Ten Fifty o'clock when HODGE entered the Rosemont address (p. 42 App.), HODGE had made at least two other significant "stops," and had ample opportunity to have acquired the "sample" in question.

This is mentioned, not only to point out, critically, that the supporting affidavit as it stands, does not affirmatively exclude the possibility of the "sample" having been procured elsewhere than at the Rosemont address; but to additionally indicate to the reviewing

court that inclusion of all the known facts in the affidavit relative to HODGE's activities *immediately prior to 10:50 P.M.*, where the affidavit begins its recitals, would have clearly precluded any finding that the "sample" derived from the Rosemont address.

Knowing these facts however, we see that the affidavit filed, skillfully and designedly, omitted mention of additionally relevant facts, which being inserted would have made issuance of the warrant a total impossibility.

Yet, it must appear that a warrant cannot be the product of "tailoring," by calculated omission of facts material to probable cause. Such "tailoring" constitutes a fraud on the court, which, on review, in the face of the truth, cannot prevail as against a defendant's right to minimal due process of law. *United States* v. *Upshaw*, 448 F.2d 1218 tells the reason why that result obtains, citing from page 1222:

> "Once it came to the attention of the court, from the testimony . . . . . that evidence had been seized on the basis of statements of fact erroneously made by the affiant which struck at the heart of the affidavit's showing of probable cause, the court was required to grant the motion to suppress. *The judicial system cannot be a party to the use of tainted evidence* . . . . ."

To hold otherwise would be to make the courts partners in what is clearly an obstruction of justice, and to make lawful the practice of agents procuring warrants for which a revelation of the full truth would demonstrate their unentitlement.

Due Process can require no less than a full revelation of all the facts bearing upon an agent's entitlement or non-entitlement to a search warrant, which is an instrument so inherently at odds with the public

interest in privacy, and the individual interest in the sanctity of the home.

Other cases make clear the meaning of the term probable cause. *Brinegar* v. *United States*, 338 U.S. 160, 175, 93 L.Ed. 1879, 1890, 69 S. Ct. 1302, classically distills out the meaning of the term. Simply, no belief, however reasonable, is sufficient to satisfy the test of "probable cause" if it merely indicates a "possibility," and not the "probability" that an event has occurred. As Brinegar states, "in dealing with probable cause . . . we deal with probabilities." There is first of all a relative distinction between the meanings conveyed by the terms "suspicion," and "belief." In such a classification "suspicion" would be generally in the area of "possibility," and "belief," in that of "probability."

Even a mere good faith "belief" on the part of officers however, will not suffice, since the second element of probable cause involves an *objective* test. In *Carroll* v. *United States*, 267 U.S. 132, 69 L.Ed. 543, 45 S. Ct. 280, 39 A.L.R. 790, on page 162 of 267 U.S., the Supreme Court held that any belief entertained by an officer must, in addition to being entertained *by him*, be an *objectively reasonable* belief. A good faith "suspicion" does not suffice. *Henry* v. *United States*, 361 U.S. 98, 4 L.Ed.2d 134, 80 S. Ct. 168 (1959).

Paragraph 11 of the affidavit (p. 9 App.), which adverts to the alleged furnishing by the defendant HODGE of a "sample" of heroin to the informant, MONDAINE, on December 13, 1973, even when coupled with the ambiguous claim of the informant, contained on p. 9 App., in paragraph 12, that HODGE had obtained the sample from his "source," does not fairly imply, to the exclusion of other possibilities, that HODGE's "source," or "stash-pad," was located at 18990 Rosemont.

Nor do the averments relative to HODGE entering the Rosemont address for some 15 minutes on the late evening of December 13, 1973, as contained in paragraphs 9 & 10 of the affidavit (p. 8 App.), create any reasonable ground for believing that the "sample" of heroin which was said to have been furnished the informant derived from that address.

But, how much less do such averments suggest that the Rosemont address was the source, if we are to add to the affidavit, all of the other facts relative to the many places Hodge went in the earlier part of the evening, and between a quarter to ten and ten fifty o'clock when Hodge left the restaurant for the Rosemont address.

The sixth circuit in its own case of *United States* v. *Saunders*, 325 F.2d 840, in 1964, said that such a situation could not give rise to anything more than "*suspicion.*"

In *Saunders* the government attempted to urge that because Eloise Saunders met in an alley with an informant moments before the informant handed his BNDD Agent a quantity of drugs, which he had made arrangements by phone to purchase, that the inference was permissible that the drugs derived in fact from Eloise Saunders, where there was no positive testimony available to that effect.

In the *Saunders* case there was proof of contact between Eloise Saunders and the informant, but there was no proof that the drugs in question derived from her. Just as, in the within case, there was no proof that the defendant HODGE obtained the "sample" furnished MONDAINE from the Rosemont address.

In *Saunders*, as here, the venerable trial Judge, HON. THOMAS THORNTON, held that the contact between ELOISE SAUNDERS and the informant, THERLAND

CRATER, moments prior to the furnishing of drugs to the agent by CRATER, gave rise to a *reasonable inference* that the drugs derived from Eloise Saunders.

The Sixth Circuit, in rejecting that argument out of hand, and *in acquitting the appellant*, ELOISE SAUNDERS on the appeal, pointed out that those circumstances created nothing more than a "suspicion" that the drugs derived from ELOISE SAUNDERS.

Further the Court stressed the importance of maintaining the distinction between "probabilities," and "possibilities," under the Fourth Amendment.

Likewise, the Fifth Circuit, in *Anthony Panci* v. *United States*, cca 5, 1958, 256 F.2d 308, decided essentially the same thing.

In *Panci*, there was testimony that an agent observed his informant sitting in a Toddle House restaurant next to Panci; that he saw Panci pass a small brown bag behind his back to the confidential informant, Guardina, and saw both men leave shortly thereafter, after which the confidential informant turned drugs over to his agent.

The confidential informant did not testify on the trial, and as here, there was only the circumstance of the Toddle House restaurant contact to justify a belief that the narcotics turned over derived from *Panci*. Of these circumstances, the appeals panel said, on p. 312 of 256 F.2d:

> Giving the evidence its fullest force it amounts to no more than that Panci was seen associating with characters of low repute, and if this conviction is allowed to stand, the result would be to convict on *suspicion*.

Further on the Court said:

> The government might have made out a case if . . . the agents had given the informer marked

> money, had searched him carefully before he left on his mission to *insure* that he had no narcotics concealed on or about him, and had kept him in sight at all times, so as to exclude his having obtained the narcotics elsewhere, and then made the arrest to find the identified money in the possession of the informer. Nothing of that kind was done here.

While petitioner concedes that proofs on a trial are required to be more substantial than those upon a probable cause hearing, it still follows that had the agents included all of the known facts in the affidavit filed, no probable cause could possibly have been shown the magistrate; for it is clear that he would have had to play a guessing game to determine where the sample, if any existed, derived from. Certainly he could not have more than a suspicion that it might have derived from the Rosemont address; and such suspicion will not support the issuance of a warrant.

Certiorari should be granted to pass upon a practice which is probably far more widespread than the cases thus far indicate. In any event, no Supreme Court case that this petitioner is aware of, declares upon the legality or illegality of the agent's omitting facts from his affidavit, known to him, which would detract from his showing of probable cause; and certiorari ought to be allowed to state what is, or is not appropriate and lawful in this regard.

4. Search – the overbroad execution of search warrant issued turning it into a general warrant whose fruits were used to convict the petitioner.

The law is clear that officers must obey the mandate of the warrant issued, and seize only those things set

forth in the language of the mandate. *Trupiano* v. *United States*, 334 U.S. 699, 92 L.Ed. 1633, 68 S. Ct. 1229.

When books and papers are to be seized, the fourth amendment requirement of description of things to be seized is accorded the most scrupulous exactitude. *Stanford* v. *Texas*, 379 U.S. 476, 13 L.Ed.2d 431, 85 S. Ct. 506; *Berger* v. *New York*, 388 U.S. 41, 18 L.Ed.2d 1873. A search warrant must particularly describe the things to be seized, and the naming of one thing as appropriate, prevents the seizure of another thing not named. That rule was reaffirmed in *Coolidge* v. *New Hampshire*, 403 U.S. 443, 467 (1971). This requirement makes "general searches" impossible, and prevents the seizure of one thing under a warrant describing another. As to what is to be taken, nothing is left to the discretion of the officer executing the warrant.

In the within case the warrant issued contained the following mandate:

> You are hereby commanded to search forthwith for the property specified . . . . to wit:
>
> approximately 1 pound of suspected heroin, a schedule I narcotic drug controlled substance, the means and instrumentalities of obtaining, storing, diluting and distributing the same; firearms which are possessed on the premises to guard said narcotic controlled substance; and any and all property, cutting boards, diluents, which constitute evidence of heroin or other narcotic or controlled substance which are use, possession, or distribution, which are being used in violation of Title 21, United States Code, Sections 841(a)(1), 844 and 846.

Nothing in the foregoing mandate authorized the seizure of checks dated more than one year before the

issuance of the warrant; and nothing in that mandate authorized the seizure of photographs or money.

Yet, as pointed out hereinabove in the Statement of the Case, the agents rummaged through the petitioner's home, and seized a photograph of himself and his co-defendant and past business checks, which were offered into evidence to presumably give force to the testimony of the informant Mondaine, and to thereby aid the conviction of the petitioner on the charge of possession with which he now stands convicted.

Yet the law requires, that, if during the execution of a search warrant the officers see something they suspect to be contraband, or possibly subject to seizure, their course is to procure a search warrant for the item sought to be seized. *United States* v. *Coots* (Ed. Tenn. S.D.), 1961, 196 F. Supp. 775. And, nothing said in *Harris* v. *United States*, 331 U.S. 145, 91 L.Ed. 1399, 67 S. Ct. 1098 could alter that requirement; for as was pointed out in *Stanley* v. *Georgia*, 394 U.S. 557, 22 L.Ed.2d 542, 89 S. Ct. 1243, on pp. 571 of 394 U.S., and p. 553 of 22 L.Ed.2d, an object cannot be seized unless its illegality is observable by "mere inspection."

Nothing about a photograph could possibly have been thought to be within the ambit of the mandate; and neither could checks of more than a year's vintage be thought to be related to the mandate, and especially where there was nothing about the checks to relate them to any narcotics transaction.

What we have then, is a situation where officers, acting under apparent authority, proceed to turn a specific warrant into a general one; and, notwithstanding the petitioner's objection to the seizure of evidence, the court permitted its use upon his trial.

Certiorari ought to be issued to determine if the petitioner was denied due process by what has

occurred, and whether his conviction is fatally defective, based on the use of such evidence.

CONCLUSION

For the foregoing reasons this petition for a Writ of Certiorari should be granted.

Respectfully submitted,

MILTON R. HENRY
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Detroit, Michigan 48207

Counsel for Petitioner

Dated: September 27, 1976

APPENDIX A

Nos. 75-2484 and 75-2485

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

EDDIE HODGE and
NATHANIEL ROBERTSON,
Defendants-Appellants.

APPEAL from the District Court of the United States for the Eastern District of Michigan Southern Division.

Decided and Filed July 23, 1976.

Before: CELEBREZZE, MILLER* and LIVELY, Circuit Judges.

Appellants were convicted by a jury in the District Court for the Southern District of Michigan of conspiring to distribute heroin in violation of 21 U.S.C. § 846 (1970), and of possession with intent to distribute heroin in violation of 21 U.S.C. § 841 (a) (1) (1970). They were sentenced to serve eight years in the custody of the Attorney General with a five year special parole term under 18 U.S.C. § 4208(a)(2)(1970).

Appellants raise two issues in challenging their convictions and Appellant Hodge raises a third in contesting his conviction. Appellants first argue that evidence seized at a residence at 18990 Rosemont in Detroit should be suppressed because sufficient information to support the issuance of the search

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* The Honorable William E. Miller died on April 12, 1976, and did not participate in this opinion.

warrant was not presented to the magistrate. Appellants also argue that the District Court erred in denying their motion to suppress recorded telephone conversations between John Mondaine, a Government informant, and Appellant Hodge. Appellants claim that admission of the conversations into evidence violated the Fourth and Fifth Amendments of the United States Constitution, the search and seizure provision of the Michigan Constitution and federal wiretap statutes, 47 U.S.C. § 605 (1970), and 18 U.S.C. § 2511 (1970). Additionally, Appellant Hodge contends that his conviction must be overturned because the District Court failed to give his requested entrapment instruction.

A review of the record indicates that John Mondaine volunteered to become an informant for the Drug Enforcement Agency (DEA) following his arrest for possession of heroin. Mondaine advised DEA agents that he could arrange for the sale of a large quantity of heroin by Hodge, to whom he was related by marriage. On December 7, 1973, Mondaine placed two telephone calls to Hodge in Detroit which were recorded by Special Agent Ryan in the Kansas City office of the DEA. During the second conversation, Mondaine indicated that he was interested in purchasing a pound of heroin. He discussed with Hodge the method of measuring the drug and the quality and price of the heroin. Mondaine indicated to Hodge that he would be in Detroit on the evening of December 13th and was assured that he would be able to purchase the heroin and leave by 12:00 p.m. the following afternoon.

On December 12th, Mondaine again called Hodge relative to the purchase of the pound of heroin. The conversation was similarly recorded in the DEA office in Kansas City by Special Agent Ryan. Mondaine indicated that he had an airplane reservation and could get out of Kansas City the following day. He threatened, however, to cancel the transaction if it was going to be delayed. Hodge assured Mondaine that he would not have to wait around because his man had a

"system."[1] They agreed that the transaction would occur at approximately 4:00 a.m., on December 14th.

At 5:30 p.m. on December 13th, Hodge arrived at Detroit Metropolitan Airport to meet Mondaine. They went to an airport locker where Hodge was shown a "flash roll"[2] of $19,500 that had been provided by the DEA. Leaving the money in the locker, both men exited the airport.

After numerous stops that evening, Mondaine and Hodge arrived at Stafford's Restaurant in Detroit at 10:40 p.m. According to Mondaine, Hodge indicated that he was leaving the restaurant to obtain a sample of heroin which Mondaine had requested.[3] DEA agents observed Hodge drive directly from the restaurant to 18990 Rosemont, the residence of Appellant Robertson. Hodge was observed to enter the residence, remain briefly, and then depart at 11:15 p.m. Agents maintained a surveillance of Hodge as he drove directly back to Stafford's. Mondaine testified that upon Hodge's return, they went to Hodge's car where Mondaine was handed a "sample"[4] which he smelled and purportedly knew to be heroin. Hodge then drove Mondaine to his wife's residence on Richton Avenue. Mondaine testified that Hodge called him there later that night and inquired about the sample. Mondaine reported that he advised Hodge that the heroin was "nice"[5] and was then told that the transaction would occur at 5:30 a.m.

Early the following morning, Hodge picked Mondaine up at the Richton residence. Mondaine testified that he was handed

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[1] Government Appendix at 11b.

[2] Government Appendix at 29b.

[3] Hodge contravened Mondaine's testimony concerning the events subsequent to the airport departure and denied providing him with any sample of heroin. However, we must view the evidence and the reasonable inferences therefrom in the light most favorable to the Government in an appeal from a criminal conviction. *United States* v. *Beck*, 511 F. 2d 997, 1003 (6th Cir. 1975).

[4] Government Appendix at 55b.

[5] Government Appendix at 58b.

a ball of heroin in Hodge's car. He reportedly insisted that the heroin be measured and was driven to an unknown location by Hodge. Mondaine claimed that he was introduced to Robertson who measured the heroin, found it to be short and reduced the price. Mondaine testified that he and Hodge then left for the airport. Upon their arrival at the airport, Mondaine reported that he left the ball of heroin in Hodge's car and went inside. He gave a pre-arranged signal to DEA agents who converged upon the car, seized the heroin and arrested Hodge.

Following the arrest, Mondaine was debriefed by DEA agents. From this information and the reports received through surveillance by DEA agents, authorities obtained a search warrant for Robertson's Rosemont residence. Seized during the execution of the warrant were various items of evidence which were admitted during the trial, including three plastic bags having water residue and traces of heroin, a photograph of Appellants, various checks and a quantity of money.

In a memorandum opinion, the District Court denied Appellant's motion for suppression of evidence seized from the Rosemont residence, holding that the affidavit upon which the warrant was issued was sufficient. The affidavit was made and submitted to a United States Magistrate on December 14, 1973, by Melvin Smith, Special Agent for the DEA, who stated that he had reason to believe that approximately one pound of heroin was being stored at 18990 Rosemont. The grounds for this belief were set forth in detail in the affidavit.[6]

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[6] **AFFIDAVIT**

Melvin Smith, Special Agent, Drug Enforcement Administration, United States Department of Justice, Detroit, Michigan, being duly sworn states:

(1)That on various occasions [within 3 months] a confidential informant of the Drug Enforcement Administration has advised that the informant has purchased various quantities of heroin from an individual known to the informant as EDWARD HODGE;

Although the question of the sufficiency of facts to support the issuance of the warrant was submitted by Appellants in

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[6] Continued

(2) That the confidential informant has advised that EDWARD HODGE deals in substantial quantities of heroin and that the informant has personally purchased 1/2 pound quantities of heroin from EDWARD HODGE;

(3) That the confidential informant has a history of proven reliability with the Drug Enforcement Administration and has been instrumental in providing reliable information in at least three (3) Federal Criminal cases;

(4) That the aforesaid confidential informant has advised that quantities of heroin are maintained by EDWARD HODGE or his girl friend prior to the completion of the transaction for the heroin;

(5) That the aforesaid confidential informant has indicated that it is EDWARD HODGE's procedure to see the purchaser's money prior to arranging for the delivery of the quantity of heroin to be purchased and that delivery occurs only after EDWARD HODGE goes to his source of supply or "stash pad" to obtain the quantity of heroin to be purchased;

(6) On December 13, 1973, at approximately 10:40 p.m. EDWARD HODGE drove the confidential informant to Stafford's Restaurant, Seven Mile Road, Detroit, Michigan.

(7) On December 13, 1973, EDWARD HODGE advised the confidential informant that he, HODGE, was going to pick up a "sample" quantity of heroin;

(8) On December 13, 1973, at approximately 10:50 p.m., EDWARD HODGE left the aforesaid informant at Stafford's Restaurant, Seven Mile Road, Detroit, Michigan;

(9) On December 13, 1973, at approximately 10:52 p.m., special agents of the Drug Enforcement Administration followed EDWARD HODGE from Stafford's Restaurant, Seven Mile Road, to 18990 Rosemont, Detroit, Michigan, and observed HODGE enter and exit the residence at approximately 11:15 p.m.;

(10) On December 13, 1973, at approximately 11:20 p.m., EDWARD HODGE left the 18990 Rosemont address and returned to Stafford's Restaurant, Seven Mile Road, Detroit, Michigan;

(11) On the same date, the confidential informant advised that EDWARD HODGE delivered to the informant a quantity of heroin, approximately 1.5 grams, as a "sample" of the quality of heroin to be delivered by HODGE;

(12) The confidential informant further advised that EDWARD HODGE indicated that he had gone directly to his source to obtain the "sample";

(13) On December 14, 1973, the confidential informant advised that EDWARD HODGE stated that he could sell additional quantities of heroin to the informant on short notice;

(14) The confidential informant further advised that EDWARD HODGE stated that he, HODGE, had an additional pound of heroin available for delivery on the morning of December 14, 1973;

(15) At approximately 6:30 a.m., on December 14, 1973, EDWARD

their joint brief,[7] only Robertson has standing to raise the issue. Fourth Amendment rights are personal rights which may not be vicariously asserted. *Simmons* v. *United States*, 390 U.S. 377, 389 (1968). In order to qualify as a person aggrieved by an unlawful search and seizure, one must have been a victim of the search – one against whom the search was directed – as distinguished from one who claims prejudice only through the use of evidence gathered as a consequence of a search directed at another. *Jones* v. *United States*, 362 U.S. 257, 261 (1969). Co-conspirators and co-defendants have been accorded no special standing. *Alderman* v. *United States*, 394 U.S. 165, 172 (1969). There is no standing to contest a search and seizure where, as here, the defendant, Hodge: (a) was not on the premises at the time of the contested search and seizure; (b) alleged no proprietary or possessory interest in the premises; and (c) was not charged with an offense that includes, as an essential element of the offense, possession of the seized evidence at the time of the contested search and seizure. *Brown* v. *United States*, 411 U.S. 223, 229 (1972).

While a warrant may issue only upon a finding of probable cause, the Supreme Court has long held that probable cause

6 Continued
HODGE telephoned the confidential informant and indicated that he, HODGE, had a pound of heroin for immediate delivery and that the quantity to be delivered was the same quality as the sample previously delivered on December 13, 1973, as it was from the same source;

(16) On December 14, 1973, at approximately 6:45 a.m., EDWARD HODGE delivered a pound of heroin to the confidential informant while they were in a 1974 Cadillac Fleetwood, Michigan License No. 6747EN;

(17) On December 14, 1973, at approximately 7:45 a.m., special agents of the Drug Enforcement Administration arrested EDWARD HODGE at Metropolitan Airport and seized from the aforesaid Cadillac Fleetwood approximately 436.2 grams of the substance purported to be heroin;

(18) On December 14, 1973, an agent of the Drug Enforcement Administration performed a field test on the aforesaid substance and received a positive reaction for heroin.

7 Appellant's brief at 22.

means less than evidence which would justify condemnation[8] and that a finding of probable cause may rest upon evidence which is not legally competent in a criminal trial.[9] As the Court noted in *Brinegar* v. *United States*, 338 U.S. 160, 175 (1949):

> In dealing with probable cause . . . as the very name implies, we deal with probabilities. These are not technical, they are factual and practical considerations of everyday life on which reasonable and prudent men, not legal technicians, act.

In accordance with this view, the Court has determined that affidavits for search warrants must be tested by both magistrates and courts in a commonsense and realistic manner. *United States* v. *Ventresca*, 380 U.S. 102, 108 (1964). In explaining the rationale for this determination, the Court in *Ventresca*, *supra* at 109, declared:

> [affidavits] are normally drafted by nonlawyers in the midst and haste of a criminal investigation. Technical requirements of elaborate specificity which once existed under common law pleadings have no proper place in this area. A grudging or negative attitude by reviewing courts toward warrants will tend to discourage police officers from submitting their evidence to a judicial officer before acting.
>
> This is not to say that probable cause can be made out by affidavits which are purely conclusory, stating only the affiant's or an informant's belief that probable cause exists without detailing any of the 'underlying circumstances' upon which that belief is based . . . . However, where these circumstances are detailed, where reason for crediting the source of the information is given and when a magistrate has found probable cause, the courts

8 *Locke* v. *United States*, 7 Cranch 339, 348 (1813).

9 *Draper* v. *United States*, 358 U.S. 307, 311 (1959).

should not invalidate the warrant by interpreting the affidavit in a hypertechnical rather than a commonsense manner.

We agree with the District Court's determination that there was probable cause to believe that drugs were stored on the Rosemont premises. The magistrate, upon a commonsense reading of the affidavit could reasonably determine that: 1) a confidential informant (Mondaine) of proven reliability had advised the DEA that Hodge dealt in substantial quantities of heroin; 2) it was Hodge's procedure to inspect the purchaser's money and then go to his source to obtain the drugs; 3) at a restaurant, Hodge informed Mondaine that he was going to get a sample of heroin; 4) a DEA agent followed Hodge to the address on the warrant and then back to the restaurant; 5) Hodge gave the sample to Mondaine indicating that he had gone directly to his source to obtain it and that it was of the quality of heroin Hodge would deliver; and 6) Hodge told Mondaine that he had one pound of heroin available for immediate delivery and could sell him additional quantities on short notice.

Robertson notes that the affidavit contains no averment that the heroin was seen at or obtained from the Rosemont residence. He argues that Hodge made many stops on the night he purportedly transferred the sample to Mondaine, yet the affidavit fails to state that Hodge could not have obtained the drugs elsewhere. In view, however, of Hodge's statements upon leaving the restaurant[10] and upon his return[11] and of the DEA surveillance reports tracking Hodge between Stafford's Restaurant and the Rosemont residence,[12] there was probable cause to believe that a quantity of heroin would be found at the Rosemont residence.

10 Paragraph 7 of the affidavit.

11 Paragraph 12 of the affidavit.

12 Paragraphs 9 and 10 of the affidavit.

Robertson additionally contends that the affidavit failed to substantiate the quantity of drugs detailed in the warrant. Robertson notes that paragraph 14 of the affidavit indicated that upon delivery of the sample Hodge told Mondaine that an additional pound of heroin was available. As one pound of heroin was seized in Hodge's car upon his arrest, Robertson claims no averment remained to support the belief that another pound of the narcotic was stored at the Rosemont residence. This argument overlooks paragraph 13 of the affidavit which indicates that Hodge stated that he could obtain additional quantities of heroin on short notice and paragraph one in which Hodge is identified as a large dealer in drugs. These paragraphs, under commonsense interpretation, provided the magistrate with probable cause to believe that heroin was present at the Rosemont address subsequent to Hodge's arrest.

Although much of the material in the affidavit is based on the hearsay statements of Mondaine, there is substantial basis for crediting that hearsay. *United States* v. *Harris*, 403 U.S. 573, 580-81 (1971). Mondaine's credibility is detailed in the warrant[13] and corroboration for portions of his narrative is supplied by DEA agents.

Robertson next argues that the warrant should be struck as a product of "tailoring", citing *United States* v. *Upshaw*, 448 F. 2d 1218 (5th Cir. 1971), *cert. den.* 405 U.S. 934 (1972). Robertson claims that there was a calculated omission of facts material to probable cause in order to perpetrate a fraud on the court. We can discover no such intentional omission and therefore find Robertson's argument to be without merit.

We turn to consideration of Appellants' second argument, that recordings of telephone conversations between Mondaine and Hodge were improperly admitted into evidence below. A person may challenge government evidence on the ground that it was seized by electronic surveillance violative of his Fourth Amendment right to be free of unreasonable searches

13 Paragraph 1 of the affidavit.

and seizures if the person was a party to the conversation or if the interception occurred on the person's premises, regardless of whether he participated in the conversation. *Alderman* v. *United States*, 394 U.S. 165, 176 (1968). Robertson, therefore, lacks standing to argue that the tapes of conversations between Hodge and Mondaine recorded at the Kansas City DEA office should have been suppressed. The argument may be advanced only on behalf of Hodge.

It was the intent of the Omnibus Crime Control and Safe Streets Act of 1968, 18 U.S.C. § 2511(c) (1970), to allow consensual interception of telephone conversations without an authorizing warrant:

> It shall not be unlawful under the Chapters for a person acting under color of law to intercept a wire or oral communication where such person is a party to the communication or *where one of the parties to the communication has given consent to such interception.* [emphasis added]

Hodge submits that no valid consent to the interception occurred as Mondaine was "coerced" into consenting in hopes of leniency. In *United States* v. *Silva*, 449 F. 2d 145, 146 (1st Cir. 1971) *cert. den.* 405 U.S. 918 the Court declared:

> . . . to establish involuntariness the defendant's burden is to show that [the informant's] will was overcome by threats or improper inducement amounting to coercion or duress . . . we do not view a promise of leniency with respect to a pending indictment as coercive, at least in the absence of evidence that the indictment had been improperly brought.

Mondaine testified that contact with the DEA was upon his voluntary initiation and that, although he hoped for leniency, no promise of leniency was offered by government officials. Hodge has presented no evidence of coercive threats or

improper inducement of Mondaine and has thus failed to carry his burden of proof on this issue.

Hodge argues that if 18 U.S.C. § 2511(c) permits the introduction of recordings of telephone conversations consented to by one of the parties, it is in violation of the Fourth Amendment. However, as no one has a constitutionally protected expectation that the person to whom he voluntarily reveals incriminating information will keep it secret, the consensual interceptions permitted under this provision do not offend the Fourth Amendment. *See United States* v. *Quintana*, 508 F. 2d 867, 872 n. 3 (7th Cir. 1975). *See also United States* v. *White*, 401 U.S. 745, 751 (1971); *Hoffa* v. *United States*, 385 U.S. 293, 302 (1966).

In an argument that is actually a mixture of Fifth and Sixth Amendment claims, Hodge submits that the interception violated his right to due process under the Fifth Amendment as the conversations were recorded to gather incriminating evidence against him without affording him: 1) the requisite warnings enumerated in *Miranda* v. *Arizona*, 384 U.S. 436 (1966); and 2) the assistance of counsel as directed in *Escobedo* v. *Illinois*, 378 U.S. 478 (1964). As *Escobedo* and *Miranda* speak specifically to custodial situations, neither is applicable authority in this case.

We also reject Hodge's argument that the introduction of the recordings violated the Federal Communications Act, 47 U.S.C. § 605 (1970).[14] It is well settled that there is no

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[14] § 605. Unauthorized publication or use of communications

Except as authorized by chapter 119, Title 18, no person receiving, assisting in receiving, transmitting, or assisting in transmitting, any interstate or foreign communication by wire or radio shall divulge or publish the existence, contents, substance, purport, effect, or meaning thereof, except through authorized channels of transmission or reception, (1) to any person other than the addressee, his agent, or attorney, (2) to a person employed or authorized to forward such communication to its destination, (3) to proper accounting or distributing officers of the various communicating centers over which the communication may be passed, (4) to the master of a ship under whom he is serving, (5) in response to a subpena issued by a court of competent jurisdiction, or (6) on demand of other lawful authority. No person not being authorized by the sender shall intercept any

violation of the Act if the interception was, as here, authorized by a party to the conversation. *Rathbun* v. *United States*, 355 U.S. 107, 109 (1957); *Bufalino* v. *Michigan Bell Telephone Co.*, 404 F.2d 1023, (6th Cir. 1968), *cert. den.* 394 U.S. 987 (1969). Nor, for the reasons discussed above, is Mondaine's consent to the recording negated solely by his hopes of leniency for cooperating with DEA officials.

Hodge next argues that the search and seizure provision of the Michigan Constitution, Article I Section II, as interpreted in *People* v. *Beavers*, 393 Mich. 554, 227 NW 2d 511 (1975), barred the receipt of the recordings into evidence. In *Beavers*, the Michigan Supreme Court held that "participant monitoring" recordings were unlawful under the Michigan Constitution unless obtained pursuant to a valid search warrant. Even if Michigan law was violated the tape recordings would not become inadmissible thereby in a federal criminal trial. It is well settled that in criminal cases, the federal District Courts will decide evidence questions on the basis of federal rather than state law. *United States* v. *Armocida*, 515 F.2d 49, 52 (3d Cir. 1975); *United States* v. *Shaffer*, 520 F.2d 1369, 1372 (2d Cir. 1975).

We turn to consideration of Hodge's final contention, that the trial judge's refusal to submit his requested entrapment

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radio communication and divulge or publish the existence, contents, substance, purport, effect, or meaning of such intercepted communication to any person. No person not being entitled thereto shall receive or assist in receiving any interstate or foreign communication by radio and use such communication (or any information therein contained) for his own benefit or for the benefit of another not entitled thereto. No person having received any intercepted radio communication or having become acquainted with the contents, substance, purport, effect, or meaning of such communication (or any part thereof) knowing that such communication was intercepted, shall divulge or publish the existence, contents, substance, purport, effect, or meaning of such communication (or any part thereof) or use such communication (or any information therein contained) for his own benefit or for the benefit of another not entitled thereto. This section shall not apply to the receiving, divulging, publishing, or utilizing the contents of any radio communication which is broadcast or transmitted by amateurs or others for the use of the general public, or which relates to ships in distress.

instruction to the jury was error. During the trial, Hodge testified that Mondaine had called him at least twelve times prior to their recorded conversation on December 7, 1973, desperate about losing his liquor store in Kansas City. Mondaine reportedly declared that his mother was very sick and that his father had been unemployed for four years. Hodge testified that he was implored by Mondaine to get him some drugs which Mondaine claimed would be the only way out of his financial difficulties. Hodge's testimony about Mondaine's imploring was uncontradicted. Hodge also denied knowing anything about or previously being involved in the narcotics business.[15] He further testified that he did not want to have anything to do with the illegal purchase of the drugs, but that his will was overbourne by the persistent urgings of Mondaine.

The District Judge has the duty of determining whether the evidence bearing on the issue of entrapment is in dispute or whether the question can be resolved as a matter of law. In cases where the evidence bearing on the question of entrapment is in dispute, the defense of entrapment must be submitted to the jury. *United States* v. *Carroll*, 518 F.2d 187, 188 (6th Cir. 1975); *United States* v. *Ambrose*, 483 F.2d 742, 746 (6th Cir. 1973); *United States* v. *Head*, 353 F.2d 566, 568 (6th Cir. 1965); *United States* v. *Cooper*, 321 F.2d 456 (6th Cir. 1963).

As we stated in *Head*, *supra* at 568:

> "Ordinarily, entrapment is a question of fact and in jury cases must be submitted to the jury. In [*Sorrells* v. *United States*, 287 U.S. 435 (1932)] the Court remanded

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[15] Hodge denied obtaining the heroin from the Rosemont address. He claimed to have contacted a man called "Rabbit" Batista around the end of November to inquire into the price and nature of the drugs. Hodge testified that the information which "Rabbit" gave him was the data he forwarded to Mondaine during their recorded conversations. He claimed that "Rabbit" delivered the heroin directly to the Richton residence and that it was simply handed to Mondaine.

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the case to the District Court for retrial with instructions to submit the issue to the jury. *It may become a question of law when the facts are undisputed.* [Emphasis supplied.]

Entrapment is established as a matter of law if the undisputed evidence demonstrates that government agents engaged in conduct which "overbears an otherwise innocent person's will and thereby induces him to commit a criminal act that he was not disposed to commit." *Ambrose, supra* at 743. If, on the other hand, the undisputed evidence demonstrates that the agents did not engage in such conduct, as a matter of law the defense of entrapment is not appropriate.

Hodge, by his undisputed testimony, effectively raised an entrapment defense by arguing that he had not previously dealt in drugs but was only, just this one time, responding to the plea of a friend in trouble. Although there was a good deal of evidence from which the jury could have concluded that Hodge was not the "unwary innocent" whom the defense of entrapment was established to protect, the District Court nevertheless erred in failing to submit the entrapment defense to the jury.

Appellants have raised a number of additional issues on appeal which we find to be without merit.

The convictions of Appellant Robertson are affirmed and the convictions of Appellant Hodge are reversed, and it is ordered for new trial.

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UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

FILED
SEP 15 1976
JOHN P. HEHMAN, Clerk

No. 75-2485

UNITED STATES OF AMERICA
Plaintiff-Appellee

v.

NATHANIEL ROBERTSON
Defendant-Appellant

BEFORE: CELEBREZZE, LIVELY and ENGEL,
Circuit Judges

ORDER STAYING MANDATE

ORDERED, That motion to stay mandate herein pending application to the Supreme Court for writ of certiorari is hereby granted and the mandate is stayed for thirty days from this date; provided that, if within such thirty days, the applicant shall file with the Clerk of this Court the certificate of the Clerk of the Supreme Court that the certiorari petition, record, and brief have been filed, the stay shall continue until the final disposition of the case by the Supreme Court. Unless this condition is complied with within such thirty days or any extension thereof made by the Court or any judge thereof, or if the condition is complied with, then upon the filing of copy of an order denying the writ applied for, the mandate shall issue.

ENTERED BY ORDER OF THE COURT

/s/ John P. Hehman
Clerk

No. 75-2485

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

UNITED STATES OF AMERICA,	)	
	)	
Plaintiff-Appellee,	)	
	)	
v.	)	ORDER
	)	
NATHANIEL ROBERTSON,	)	
	)	
Defendant-Appellant.	)	

Before: CELEBREZZE, LIVELY and ENGEL, Circuit Judges.

The Defendant-Appellant filed a petition for rehearing with a request for rehearing en banc. No Judge of this Court having moved for a rehearing en banc, the petition to rehear has been referred to the hearing panel.

Upon consideration, the Court being advised, it is ORDERED that the petition for rehearing be denied.

ENTERED BY ORDER OF THE COURT

/s/ John P. Hehman
JOHN P. HEHMAN, CLERK

FILED
SEP 3 1976
JOHN P. HEHMAN, Clerk

Detroit, Michigan

Monday, October 8, 1974

12:20 P.M.

– – –

THE COURT: Mr. Clerk, it is our understand that the jury has reached a verdict; is that correct?

THE CLERK: Yes, Your Honor.

THE COURT: You may take the verdict.

THE CLERK: Mr. Foreman, will you please rise.

Members of the jury, knowing that you have agreed on a verdict, how do you find the defendant Edward Hodge?

THE FOREMAN: We find the defendant guilty on count one.

THE CLERK: As to count two, how do you find the defendant Edward Hodge?

THE FOREMAN: Guilty of count two.

THE CLERK: How do you find the defendant Nathaniel Robertson?

THE FOREMAN: Guilty on count two.

THE CLERK: Members of the jury,

PALMER-LEWIS & ASSOCIATES
Certified Shorthand Reporters
1234 Lafayette Building
Detroit, Michigan 48226
(313) 962-7727

BND FORM 6A (REV. 7/70)

REPORT OF INVESTIGATION (Continuation)

DATE: December 20, 1973 PAGE 3 OF 6

FILE TITLE	IDENTIFIER	FILE NUMBER
Edward HODGE	DA4-H2	HI-73-0279
	PROGRAM CODE: DA4-H2	

8. The previously mentioned Agents and ROBERTSON then proceeded to 18990 Rosemont, Detroit, Michigan arriving at about 11:45 AM, and at this time entered the residence.

9. ROBERTSON has previously informed Agents Dunn, Ryan and Demmink that his wife, Mary Lee ROBERTSON was presently at the residence and that his children were at school. Upon entering the residence, Mrs. ROBERTSON was found to be in the residence. The above listed Agents then made a cursory search of the residence to determine if any armed accomplices were present, and the premises was then secured until Special Agent Smith arrived with the search warrant.

10. At about 12:00 PM, Special Agent Melvin Smith, Detroit Police Department Patrolmen Gaskin and Miller then arrived at 18990 Rosemont, Detroit, Michigan with the search warrant and at this time, Special Agent Smith presented Nathaniel ROBERTSON a copy of the search warrant for the residence.

11. At this time, the above listed Agents and Officers began a search of the residence and the following narcotic exhibit and non-narcotic Exhibits were seized as a result:

Exhibit 2 – One clear plastic bag, weighing approximately 3.3 grams (gross), containing traces of a white powdery substance, being suspected Heroin, seized by Special Agent Demmink from the kitchen counter.

Exhibit D – $9,990 U.S. Currency, assigned DEA fiscal #6-38-74, which was seized by Special Agent Antonucci from a closet in the southwest bedroom closet.

Exhibit F – One .38 caliber Smith and Wesson Model 10, 6 shot, 2" barrel, nickle plated revolver, bearing serial number D-544742. Exhibit F was seized by Special Agent Antonucci from the person of Nathaniel ROBERTSON, subsequent to detaining him near the intersection of Lindsay and 7 Mile Road, Detroit, Michigan.

Exhibit H – Three clear plastic bags (lock-sealed) seized by Special Agent Gregory Demmink along with Exhibit #2 from the kitchen counter. Each of these bags had been rinsed out as each had a liquid residue remaining in it indicating that a quantity of Heroin had perhaps recently been disposed of.

Exhibit J – One polaroid picture of defendants HODGE and ROBERTSON seized by Special Agent Gregory Demmink from behind the bar upon a shelf in the basement of 18990 Rosemont, Detroit, Michigan.

Also, various personal papers were seized from the residence in order to further develop conspiracy charges against defendants HODGE and ROBERTSON. The following exhibits were seized:

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Bureau of Narcotics and Dangerous Drugs
Department of Justice

This report is the property of the Bureau of Narcotics and Dangerous Drugs.
Neither it nor its contents may be disseminated outside the agency to which loaned.

Supreme Court, U. S.
FILED
JAN 27 1977
MICHAEL RODAK, JR., CLERK

No. 76-480

In the Supreme Court of the United States

OCTOBER TERM, 1976

NATHANIEL ROBERTSON, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

DANIEL M. FRIEDMAN,
Acting Solicitor General,

RICHARD L. THORNBURGH,
Assistant Attorney General,

JEROME M. FEIT,
ELLIOTT SCHULDER,
Attorneys,
Department of Justice,
Washington, D.C. 20530.

In the Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-480

NATHANIEL ROBERTSON, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. 1a-14a) is reported at 539 F. 2d 898.

JURISDICTION

The judgment of the court of appeals was entered on July 23, 1976. A petition for rehearing and rehearing *en banc* (Pet. App. 16a) was denied on September 3, 1976. Mr. Justice Stewart extended the time for filing a petition for a writ of certiorari to and including October 18, 1976, and the petition was filed on October 4, 1976. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the district court correctly denied petitioner's motion to suppress recordings of intercepted telephone conversations between his co-defendant and a government informant.

2. Whether the seizure of evidence from petitioner's residence was authorized by a valid search warrant.

STATEMENT

After a jury trial in the United States District Court for the Eastern District of Michigan, petitioner was convicted of conspiring to distribute heroin, in violation of 21 U.S.C. 846, and of possessing heroin with intent to distribute it, in violation of 21 U.S.C. 841(a)(1).[1] He was sentenced to eight years' imprisonment and five years' special parole. The court of appeals affirmed (Pet. App. 1a-14a).

On December 7, 1973, John Mondaine, an informant for the Drug Enforcement Agency (DEA) in Kansas City, Missouri, telephoned co-defendant Edward Hodge[2] in Detroit to say that he wanted to buy a pound of heroin (Tr. I. 32, 35).[3] The two men discussed the quantity, quality, and price of the drug (Tr. I. 35-36) and tentatively agreed that Mondaine would go to Detroit to effect the transaction (Pet.

[1]Petitioner asserts (Pet. 6) that he was found guilty of the possession count alone and points in support of this proposition to a statement by the jury foreman (Pet. App. 17a) indicating that the jury returned a guilty verdict as to only one count. Petitioner omits reference to the page of the transcript (Tr. II. 861) that follows the page he reproduces and that shows that the jury convicted on both counts. Moreover, as the court of appeals indicated (Pet. App. 1a), the judgment states that petitioner was convicted on both counts. The transcript of the proceedings at sentencing also shows that petitioner was convicted on both counts (Tr. II. 864) and that he did not take exception to the court's statement at sentencing that he had been so convicted.

[2]Hodge's conviction was reversed on the ground that the trial judge erred in refusing to submit his defense of entrapment to the jury (Pet. App. 12a-14a).

[3]"Tr. I." refers to the first volume of trial transcript, which includes testimony taken on September 20, 1974, and is paginated separately from "Tr. II.," which covers the pretrial hearing on defendants' motion to suppress the recordings of the intercepted communications, and the remainder of the trial.

App. 2a). The conversation was recorded with Mondaine's consent by DEA Agent Ryan (Tr. I. 37; Tr. II. 188-190), and a recording of it was introduced into evidence and played for the jury at trial (Tr. II. 193, 209, 214).

On December 12, 1973, Mondaine telephoned Hodge again. The two men agreed to consummate the transaction on December 14 (Pet. App. 2a-3a). This conversation was also recorded (Tr. II. 190) and admitted in evidence at trial (Tr. I. 193, 215).

On December 13, Hodge met Mondaine at Detroit Metropolitan Airport. Mondaine displayed $19,200, which he left in an airport locker (Tr. I. 40, 44; Tr. II. 217, 220). After driving about and making numerous stops, the two men drove to Stafford's Restaurant in Detroit, arriving at about 10:40 p.m. (Tr. I. 45, 47-48, 95-96; Tr. II. 257, 363).

Hodge told Mondaine that he would have to leave to obtain a sample of the heroin (Tr. I. 96-97). He then drove directly from the restaurant to petitioner's residence—all the time under surveillance by DEA agents. He stayed at petitioner's home only momentarily, and then drove directly back to the restaurant (Tr. II. 257-260, 364-365). Upon his return he handed Mondaine a small package, which he said contained heroin (Tr. I. 98-100).

Early the next morning Hodge gave Mondaine a ball-shaped package of heroin (Tr. I. 102-103). Mondaine insisted that the heroin be measured. Hodge drove him to an unknown location, where he was introduced to petitioner (Tr. I. 104-105), who measured the heroin, found it to be "short," and reduced the price accordingly (Tr. I. 107). Hodge and Mondaine then drove to the airport, where DEA agents arrested Hodge and seized the heroin (Tr. I. 109; Tr. II. 221-223, 317, 367, 442).

Following Hodge's arrest the agents, acting pursuant to a warrant,[4] searched petitioner's house and seized three plastic bags containing water residue and traces of heroin, a photograph depicting petitioner and Hodge, several checks, and a quantity of currency (Tr. II. 267-268, 322-327, 333-335, 443-444).

ARGUMENT

1. Petitioner contends (Pet. 10-16) that the recordings of the telephone conversations between Mondaine and co-defendant Hodge should have been suppressed because Michigan law forbids the use in evidence of conversations intercepted without a warrant or the consent of both parties. As the court of appeals correctly held, however (Pet. App. 9a-10a), since petitioner was neither a party to the intercepted communications nor a target of the interceptions, he lacks standing to challenge the admissibility of the recordings. See *Alderman* v. *United States*, 394 U.S. 165, 175-176; *United States* v. *Armocida*, 515 F. 2d 29, 35 n. 1 (C.A. 3), certiorari denied *sub nom. Joseph* v. *United States*, 423 U.S. 858.

In any event, petitioner's reliance on Michigan law is unavailing, since federal rather than state law determines the admissibility of evidence in the federal courts. See *Ker* v. *California*, 374 U.S. 23, 31-33; *Elkins* v. *United States*, 364 U.S. 206, 224. Mondaine's consent to the recording of his conversations with Hodge made the recording lawful under 18 U.S.C. 2511(2)(c),[5] and the recordings were therefore properly admitted regardless of inconsistent state law. See *United States* v. *Magda*, C.A. 2, No. 76-238, decided

[4]The underlying affidavit is reproduced at Pet. 16-19, and at Pet. App. 4a-6a, n. 6.

[5]And under the Constitution as well, see *United States* v. *Bonanno*, 487 F. 2d 654, 657-658 (C.A. 2); see also *United States* v. *White*, 401 U.S. 745, 751.

December 22, 1976, slip op. 1039-1040 n. 2; *United States* v. *Armocida, supra*, 515 F. 2d at 51-52; *United States* v. *Keen*, 508 F. 2d 986, 988-989 (C.A. 9), certiorari denied, 421 U.S. 929; *United States* v. *Melancon*, 462 F. 2d 82, 91-92 (C.A. 5), certiorari denied, 409 U.S. 1038; *United States* v. *Sims*, 450 F. 2d 261, 262-263 (C.A. 4).

2. Petitioner also asserts (Pet. 16-35) that the warrant-authorized search and seizure conducted at his residence was unlawful.

a. Contrary to petitioner's contention, the affidavit submitted in support of the warrant, when tested in a commonsense fashion (*United States* v. *Ventresca*, 380 U.S. 102, 108), furnished probable cause to believe that petitioner's house was the source of the sample of heroin that Hodge had obtained for Mondaine and that it contained additional quantities of the drug. As the court of appeals correctly noted (Pet. App. 8a), the magistrate reasonably could have found, on the basis of the information contained in the affidavit, that:

> 1) a confidential informant (Mondaine) of proven reliability had advised the DEA that Hodge dealt in substantial quantities of heroin; 2) it was Hodge's procedure to inspect the purchaser's money and then go to his source to obtain the drugs; 3) at a restaurant, Hodge informed Mondaine that he was going to get a sample of heroin; 4) a DEA agent followed Hodge to the address on the warrant and then back to the restaurant; 5) Hodge gave the sample to Mondaine indicating that he had gone directly to his source to obtain it and that it was of the quality of heroin Hodge would deliver; and 6) Hodge told Mondaine that he had one pound of

heroin available for immediate delivery and could sell him additional quantities on short notice.[6]

b. Petitioner also claims (Pet. 20-25) that the affidavit was inadequate because it contained double hearsay, in the form of Hodge's statement to Mondaine that he was going to obtain the heroin from his source. Multiple hearsay does not, however, invalidate an otherwise valid search warrant. Rather, an affidavit containing double hearsay will be deemed sufficient whenever it presents facts showing the reliability of the declarant and the accuracy of his information. See, *e.g.*, *United States* v. *DiNovo*, 523 F. 2d 197 (C.A. 7), certiorari denied, 423 U.S. 1016; *United States* v. *McCoy*, 478 F. 2d 176 (C.A. 10), certiorari denied, 414 U.S. 828; *United States* v. *Smith*, 462 F. 2d 456 (C.A. 8).

The instant affidavit meets that test. It established Hodge's credentials as a knowledgable heroin dealer through Mondaine's descriptions of their previous dealings and through the seizure of a large quantity of heroin from Hodge's automobile. Moreover, Hodge's references to obtaining the heroin sample from his source were sufficiently adverse to his penal interest to justify an inference of reliability (see *United States* v. *Harris*, 403 U.S. 573, 579). Finally, the surveillance of his trip from the restaurant to petitioner's residence, and his delivery of a sample of the heroin to Mondaine immediately thereafter, lent added verification to his statements mentioned in the

[6]Petitioner's argument (Pet. 20) that the affidavit was insufficient because it contained no express averment that Hodge's statements about obtaining the heroin from his source were made at the exact moment he left the restaurant amounts to "the very sort of hypertechnicality * * * condemned by this Court in *Ventresca*" (*United States* v. *Harris*, 403 U.S. 573, 579). A realistic reading of the affidavit reveals that paragraphs 6 through 18 (Pet. 17-19) present a sequential narrative that provides a reasonable basis to conclude, as did both courts below, that Hodge had procured the sample from petitioner's residence (Pet. App. 4a-6a, n. 6).

affidavit. See *United States* v. *Gavic*, 520 F. 2d 1346, 1350-1351 (C.A. 8); *United States* v. *Carmichael*, 489 F. 2d 983, 986-987 (C.A. 7); *United States* v. *Alonzo*, 447 F. 2d 126 (C.A. 2).

c. As the court of appeals correctly concluded (Pet. App. 8a-9a), there is no substance to petitioner's contention that the affidavit was "tailored" to omit a material fact that would, if known, have negated probable cause. It is true that the affidavit did not include a detailed itinerary of Hodge's stops in the Detroit area on December 13, 1973, prior to his and Mondaine's arrival at the restaurant. But nothing in the record indicates that this omission was intended in any way to deceive the magistrate; rather, it would seem most reasonable to assume that these facts were omitted because of their irrelevancy to the issue of probable cause to believe that petitioner's house contained drugs. In any event, given Hodge's statements about obtaining the sample, and the observation of his movements between the restaurant and petitioner's house, there was probable cause to believe that a quantity of heroin would be found at the latter address even if Hodge's irrelevant travels earlier in the evening had been considered.[7]

d. Finally, petitioner asserts (Pet. 32-35) that the agents executing the search warrant exceeded its mandate in seizing a photograph (of Hodge and petitioner) and three checks drawn by petitioner and endorsed either by Hodge, Hodge's girlfriend, or Hodge's business. Contrary to petitioner's assertion, however, these articles were within the scope of the warrant, which authorized seizure of "any and all property * * * which constitute[s] evidence of heroin or other narcotics or controlled substance

[7]The cases cited by petitioner (Pet. 26, 28) involve affirmative misstatements of fact and are accordingly inapposite.

* * * which are being used in violation of Title 21, United States Code, Sections 841(a)(1), 844, 846" (Pet. 33). The checks and the photograph tended to establish petitioner's association and involvement with Hodge and were therefore probative of the existence of the conspiracy. See *United States* v. *Nathan,* 476 F. 2d 456, 460 (C.A. 2), certiorari denied, 414 U.S. 823; *United States* v. *Armone,* 363 F. 2d 385, 403-404 (C.A. 2), certiorari denied, 385 U.S. 957. Accordingly, these items were sufficiently designated in the warrant to justify their seizure by the agents.

In any case, the seized items came into the agents' view while the agents were executing a valid warrant, and "[i]t has long been settled that objects falling in the plain view of an officer who has a right to be in the position to have that view are subject to seizure and may be introduced in evidence." *Harris* v. *United States, supra,* 390 U.S. 236. The DEA agents executing the warrant had probable cause to "believe that the evidence [seized would] aid in a particular apprehension or conviction" (*Warden* v. *Hayden,* 387 U.S. 294, 307), and the seizure was accordingly lawful. See *United States* v. *Kane,* 450 F. 2d 77, 85 (C.A. 5), certiorari denied, 405 U.S. 934, and *sub nom. Sklaroff* v. *United States,* 405 U.S. 920; see also *Andresen* v. *Maryland,* No. 74-1646, decided June 29, 1976.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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